FOR THE JUNIORS.

INSTRUMENTS UNDER SEAL IN VIRGINIA.—The Virginia statute enacts (Code Va., sec. 2841): "Any writing to which a natural person making it shall affix a scroll by way of seal shall be of the same force as if it were actually sealed." The question arises, when is a scroll *affixed by way of seal* so as to satisfy this statute? It is the established doctrine in Virginia as to writings whose efficacy does not depend on their being under seal, as, for example, promises to pay money, which may assume the form of either simple contracts or contracts by specialty, that a *scroll* thereon is not affixed by way of seal, unless it be *acknowledged as a seal in the body of the instrument.* Thus in the case of *Clegg v. Lemessurier*, 15 Gratt. 108, it was held that a writing for the payment of money, or other purpose for which a deed is not required, though it has a scroll at the foot thereof with the word seal written therein, thus { SEAL. }, still cannot be considered in Virginia a sealed instrument, if there be no recognition of the scroll as a seal in the body of the instrument, the word "seal" written in the scroll, not being in the body of the instrument. This recognition is usually by the words "Witness my hand and seal," above the signature, and thus in the body of the instrument. And it is held that, in the absence of these words, extrinsic evidence is inadmissible to show that in fact the scroll was affixed by way of seal. *Clegg v. Lemessurier, supra.* Thus in *Gover v. Chamberlain*, 83 Va. 286, this instrument was held not under seal: "$507. Waterford, Va., Jan'y 1st, 1871. One day after date I promise to pay Samuel A. Gover, or order, the sum of five hundred and seven dollars, value received. S. E. Chamberlain. { SEAL. }." But if the words, "Witness my hand and seal," do occur in the body of the instrument, then a scroll following the signature will be sufficient, though the word "seal" is not written therein; and it has been held in Virginia that the word "seal," following the signature, is also sufficient, though there be no scroll around it. *Lewis v. Overby*, 28 Gratt. 627. So, provided always the words "witness my hand and seal," or similar words, occur in the body of the instrument, a scroll is sufficient, without the word "seal" therein; or the word "seal" is sufficient without a scroll around it.

The above doctrine as to the necessity of the recognition in the body of the instrument of a scroll used by way of seal prevails in four or five States, besides Virginia (see 1 Devlin on Deeds, sec. 251); and even in States where it is not necessary it is usual to insert the words, "Witness my hand and seal," above the signature to a sealed instrument. But in many of the States a scroll may be used for a seal without any recognition in the body of the instrument. And even in Virginia an instrument which purports to *convey land* (which conveyance *must be by deed*) is considered under seal if a scroll be annexed to the grantor's signature, and the instrument is acknowledged by the grantor in order to authenticate it for recordation, although the scroll is not recognized in the body of the instrument.

See *Ashwell v. Ayres*, 4 Gratt. 283. And the same doctrine is held in West Virginia. *Smith v. Heming*, 10 W. Va. 596.

So far we have considered the case where a scroll is apparent on the face of the writing, and the only question is, whether it was affixed thereto by way of seal. But a different question is presented where, though there is full recognition of the instrument in the body thereof as a sealed instrument by the words "witness my hand and seal," or in the attestation clause it is declared to be "sealed" in the presence of the witnesses—yet on inspection of the instrument neither wax, wafer, scroll, or any mark of a seal is found upon it. Can such an instrument be deemed under seal? In the recent case of *Reusens v. Lawson*, 1 Va. Law Reg. 494, the following language of Judge Parker in *Parks v. Hewlett*, 9 Leigh, 518 (taken from Sugden on Powers, p. 236), is disapproved by Buchanan, J.: "If in the attestation of an instrument it is stated to have been sealed in the presence of witnesses, it will, in the absence of evidence to the contrary, be presumed to have been sealed, although no impression appear on the parchment or paper;" he declaring (at p. 509), "In the absence of other facts, I do not think such a paper as Judge Parker describes could be held in this State to be a sealed instrument." But on the facts of *Reusens v. Lawson*, it was held that whether a copy of a deed offered in evidence had once been sealed (no mark of a seal or scroll appearing on its face) was a question for the jury. These facts were thus stated by Buchanan, J.:

"If, however, an original instrument, more than fifty years old, was offered in evidence, and was a good deed in form and substance, except that it lacked the wax, wafer, scroll, or other mark of a seal upon it, purporting to convey land, recognized the seal in the body of the instrument, was attested by witnesses who declared that it was signed, sealed, and delivered in their presence, was acknowledged as a deed before the officers taking the acknowledgment, was stated by the clerk (who certified to the official character of the officers who took the acknowledgment) to be the acknowledgment of a deed, was admitted to record as a deed, the land conveyed by it at once transferred on the land books for the purposes of taxation from the vendor to the vendee (which could not be legally done unless it was a conveyance of the land—chapter 183, sec. 30, Rev. Code, 1819), with evidence tending to show the payment of taxes thereon, acts of ownership exercised over and possession taken of part of the land, I think the question whether or not it had been properly sealed before its delivery clearly ought to be submitted to a jury. And if, under such circumstances, it would be proper to submit the question to the jury where the original is offered in evidence, is there any good reason, where the original is lost, and a copy offered in evidence, under the same circumstances, why the question of sealing should not also be submitted to the jury?" . . . The weight of authority, meagre as it is, and the better reason, seem to be in favor of allowing such an instrument to go to the jury, for it to say, upon all the evidence in the cause, whether or not the original instrument was properly sealed. Whether such paper was a sealed or unsealed instrument was formerly treated as a matter of law, to be determined by the court, but seems now considered a question of fact, and is in all cases submitted to the jury. Tayl. Ev., sec. 149 (old ed. sec. 128), note." See, also, 1 Va. Law Reg. p. 518, note by the editor to *Reusens v. Lawson*.

It will be observed that the decision in *Reusens v. Lawson* is only to the effect that "under such circumstances," the question whether an original deed, of which

a copy was offered in evidence, was under seal should be submitted to the jury. It will require further decisions to show whether the full array of facts as recited by the Court is necessary to send the question to the jury, or whether some of them might be absent without changing the result. See the language of Judge Cooley in *Starkweather v. Martin*, 28 Mich. 471, quoted in *Reusens v. Lawson*, 1 Va. Law Reg. 511.

TRANSFER OF TITLE IN CHATTELS NOT SPECIFIC—DOCTRINE OF KIMBERLEY V. PATCHIN.—The rule is generally laid down that until the subject-matter of a sale is specified, and, by selection and separation, if necessary, appropriated to the sale contract, the transfer of the title is postponed; for how can *title* pass from seller to buyer in that whose *identity* is not yet ascertained? This is an obvious conclusion where the chattel is altogether unascertained; but what is the rule where the owner of a mass of wheat, *e. g.*, or of a number of barrels of flour, all of the same quality or kind, makes a sale of, say, one hundred bushels of wheat out of a mass containing one thousand bushels, or of ten barrels of flour out of a pile of one hundred barrels? If destruction of the wheat or flour takes place after the sale but before separation of the part sold from the larger mass or pile, on whom does the loss fall, on the seller or buyer? This depends, of course, on the inquiry *where is the title;* for *res perit domino*, and the owner must bear the loss.

On this very interesting and important question, the cases are in conflict, with the weight of authority, perhaps, in favor of the view that the goods are not specific, and title cannot pass, until they are made specific by separation. See 2 Sch. P. P. sec. 257, citing to this effect *Scudder v. Worster*, 11 Cush. (Massachusetts) 573, where the bargain was for a certain number of barrels of pork, not identified or distinguished from the larger number which the seller had on hand; *Waldo v. Belcher*, 11 Iredell (North Carolina) 609, where the sale was of so many bushels out of a larger mass which the seller kept in store; and *Bailey v. Smith*, 43 New Hampshire, 141, where the sale was of 2,000 telegraph poles out of a lot containing 2,100. And see in accord, *Woods v. McGee*, 7 Ohio (Part II) 127 (30 Am. Dec. 202); *Hubler v. Gaston*, 9 Oregon, 66 (42 Am. Rep. 794); *Bank v. Gillette*, 90 Indiana, 268 (46 Am. Rep. 222). See also, *Carpenter v. Medford*, 99 North Carolina, 495 (6 Am. St. Rep. 534).

But, on the other hand, there are now a number of decisions which hold that in cases like those put above of the wheat and flour, where there is no difference in kind or quality, and no selection is required of the part sold from the larger mass or number, but only separation, then, *if the parties so intend*, title to the part sold vests at once in the buyer, without awaiting actual separation. This doctrine obtains in Virginia, New York, Maine, and Connecticut, and other states; and it is predicted by Hare (on Contracts, pp. 425-6) that it will ultimately prevail in the United States as conducive to the dispatch and certainty which are essential to the successful prosecution of commercial operations. See in favor of this view *Pleasants v. Pendleton*, 6 Rand. 473 (18 Am. Dec. 726); *Kimberley v. Patchin*, 19 New York, 330 (75 Am. Dec. 334); *Chapman v. Sheppard*, 39 Connecticut, 413, Pattee's Cases on Sales, 264; *Cloke v. Shafroth*, 137 Illinois, 393 (31 Am. St. Rep. 375).

The doctrine that *title can pass* in part of a mass or number of like kind or